

E-Filed 2/6/2009

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

CHONG'S PRODUCE, INC.,

Plaintiff,

v.

KIMOMEX MARKETS, INC. et al.,

Defendants.

Case Number C09-534 JF

ORDER¹ DENYING EX PARTE
REQUEST FOR TEMPORARY
RESTRAINING ORDER WITHOUT
PREJUDICE AND SETTING
HEARING ON MOTION FOR
PRELIMINARY INJUNCTION

[re: docket no. 2]

Plaintiff Chong's Produce, Inc. ("Plaintiff") alleges that Defendant Kimomex Markets, Inc. ("Defendant") owes at least \$77,867.44 for perishable agricultural commodities delivered and accepted in a series of transactions between May 18, 2008 until the filing date of the instant action. Plaintiff seeks a temporary restraining order ("TRO") and preliminary injunction enjoining Defendant from dissipating the assets of a Perishable Agricultural Commodities Act ("PACA") statutory trust. Plaintiff has not given notice to Defendant of the instant request.

PACA imposes a statutory trust on all produce-related assets held by agricultural

¹ This disposition is not designated for publication in the official reports.

1 merchants, dealers, and brokers. 7 U.S.C. § 499e(c). Defendant is a dealer under PACA. *See id.*
2 A district court may issue an order for injunctive relief to preserve the assets of the statutory
3 trust. *See Frio Ice, S.A. v. Sunfruit, Inc.*, 918 F.2d 154, 158-59 (1990).

4 The standard for issuing a TRO is the same as that for issuing a preliminary injunction.
5 *Brown Jordan Int'l, Inc. v. Mind's Eye Interiors, Inc.*, 236 F. Supp. 2d 1152, 1154 (D. Hawaii
6 2002); *Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323
7 (N.D. Cal. 1995). In the Ninth Circuit, a party seeking a preliminary injunction must show either
8 (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the
9 existence of serious questions going to the merits and the balance of hardships tipping in the
10 movant's favor. *Roe v. Anderson*, 134 F.3d 1400, 1401-02 (9th Cir. 1998); *Apple Computer, Inc.*
11 *v. Formula Int'l, Inc.*, 725 F.2d 521, 523 (9th Cir. 1984). These formulations represent two
12 points on a sliding scale in which the required degree of irreparable harm increases as the
13 probability of success decreases. *Roe*, 134 F.3d at 1402.

14 A TRO may be issued without notice to the adverse party *only if* "(A) specific facts in an
15 affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or
16 damage will result to the movant before the adverse party can be heard in opposition; and (B) the
17 movant's attorney certifies in writing any efforts made to give notice and the reasons why it
18 should not be required." Fed. R. Civ. P. 65(b)(1). Moreover, in this district an applicant for a
19 TRO must give notice to the adverse party "[u]nless relieved by order of a Judge for good cause
20 shown, on or before the day of an *ex parte* motion for a temporary restraining order." Civ. L.R.
21 65-1(b).

22 Plaintiff argues that it is entitled to a TRO without notice because "[g]iving notice to
23 Kimomex will only provide it advance warning that an order may be entered, thereby giving it
24 time to further dissipate its trust assets by paying personal liabilities or non-trust creditors prior to
25 the entry of the order." Ex Parte Mot. for TRO at 5. However, Plaintiff does not set forth any
26 facts in support of this statement other than conclusory statements in an accompanying
27 declaration. In the declaration, Plaintiff's president states that "based on my personal experience,
28

1 it appears that Kimomex has and is continuing to dissipate the PACA trust.” Chong Decl. ¶21.
 2 No other evidence other than personal belief is given in support of the request for a TRO. In
 3 addition, Defendant tendered a payment of \$5,252.22 to Plaintiff on January 30, 2009. This
 4 payment appears to have been made pursuant to an informal agreement between the parties to
 5 repay the amount owed to Plaintiff. *See id.* ¶¶16-19. There is no evidence that Defendant lacks
 6 the means to repay Plaintiff. *Cf. Chiquita Fresh, N.A., L.L.C. v. Gallegos Intern., L.L.C.*, No.
 7 07CV1305, 2007 WL 2684894, at *1 (E.D. Cal. Sept. 10, 2007) (checks tendered to plaintiff in
 8 attempt to satisfy debt were rejected for insufficient funds, demonstrating a threat to the PACA
 9 trust assets).

10 Because Plaintiff has not shown that providing notice would cause immediate and
 11 irreparable injury, the request for a TRO is denied without prejudice to reconsideration after
 12 notice has been given.

13 ORDER

14 Good cause therefor appearing, IT IS HEREBY ORDERED that:

- 15 1. Plaintiff’s application for a TRO is DENIED without prejudice;
- 16 2. Plaintiff’s motion for preliminary injunction is set for hearing on February 27,
 17 2009 at 9:00 am. Each party may file a brief in support of or in opposition to the
 18 motion for preliminary injunction, not to exceed fifteen (15) pages in length, on or
 19 before February 24, 2009.

20
 21 DATED: February 6, 2009

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 23 
 24 JEREMY FOGEL
 United States District Judge

1 This Order has been served upon the following persons:

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